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IN THE

Supreme Court of the United States

October Term, 1960

No. 495

COMMUNIST PARTY, U. S. A. and COMMUNIST PARTY OF NEW YORK STATE,

Petitioners,

v.

ISADOR LUBIN, as Industrial Commissioner.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW YORK

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Citations

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Communist Party, U. S. A. (herein called the "National Party") and Communist Party of New York State (herein called the "State Party") petition that a writ of certiorari issue to review a judgment of the Court of Appeals of New York (Appendix B hereto) reversing an order of the Appellate Division, Third Department, of the Supreme Court of New York and reinstating a determination of the respondent Industrial Commissioner suspending the registrations of petitioners as contributing employers under the New York Unemployment Insurance Law, (Labor Law, secs. 500 *et seq.*, Consolidated Laws, Chap. 31, Art. 18).

Opinions Below

The prevailing and dissenting opinions of the Court of Appeals are reported in 8 N. Y. 2d 77. The opinion of the Appellate Division is reported in 8 App. Div. 2d 918. All of the opinions appear in Appendix A hereto.

Jurisdiction

The judgment of the Court of Appeals is dated and was entered on May 26, 1960. On July 15, 1960, an order was entered by Mr. Justice Frankfurter extending the time for filing a petition for certiorari to and including October 24, 1960. Jurisdiction of this Court is conferred by 28 U. S. C. 1257.

Questions Presented

1. Whether the Court of Appeals erred in construing section 3 of the Communist Control Act of 1954, 50 U. S. C. 842, as depriving petitioners of the status of contributing employers under the New York Unemployment Insurance Law.

2. Whether the Court of Appeals erred in deciding that section 3 of the Communist Control Act, on its face and as construed and applied, does not violate the Constitution of the United States.

3. Whether the Court of Appeals erred in deciding that the action of the respondent Industrial Commissioner in suspending the registrations of petitioners as contributing employers under the New York Unemployment Insurance Law did not deny petitioners due process of law and the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States.

Statutes Involved

The pertinent provisions of the Communist Control Act of 1954 and the New York Unemployment Insurance Law appear in Appendix C.

Statement of the Case

On March 26, 1957, the respondent suspended the registrations of petitioners as contributing employers under the New York Unemployment Insurance Law and directed that no further payment of contributions be made by them (R. 48, 51).[1] This action followed a ruling by respondent that a former employee of the National Party, Albertson, was not entitled to unemployment insurance benefits based on his employment by it (R. 44).

Administrative review of the respondent's action suspending petitioners and denying Albertson's claim for benefits was had in statutory proceedings before an unemployment insurance referee who consolidated the cases for hearing (R. 19).

At the hearing, respondent did not contend that his rulings were made pursuant to any provision of the Unemployment Insurance Law or other state statute. Nor did he offer evidence in support of his position. Instead, he relied exclusively on an opinion of the New York Attorney General on which his rulings had been based (R. 57). This opinion (Appendix C hereto) cites sections 2 and 3 of the Communist Control Act (50 U. S. C. 841, 842) and other legislative and judicial characterizations of the petitioners and concludes that "the Communist Party is a conspiracy against the Government of the United States and of this State," and therefore "it would be an anomaly in law, not to say amoral and against public policy, for the Communist Party and its employees to be permitted to enjoy the advantages and benefits of this public insurance program."

Albertson testified that he had been employed by the National Party as an assistant labor secretary and that his

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[1] The Unemployment Insurance Law uses the term "contributions" to denote the taxes which it levies on employers with respect to wages paid by them. See Labor Law, sec. 570.

duties consisted of studying trends in the labor movement and analyzing proposed labor legislation (R. 200-01).

Petitioners' evidence showed that the petitioners had paid unemployment insurance contributions as contributing employers from the inception of the law in 1936 until their suspension, and that they were currently paying taxes under the Federal Unemployment Tax Act (26 U. S. C. Chap. 23) to the Bureau of Internal Revenue (R. 201). Petitioners further showed that the action of respondent in suspending them as contributing employers had the effect of greatly increasing the aggregate tax payable by each under the interrelated systems of state and federal unemployment insurance taxation. This is so because New York has a so-called "experience rating" scheme which reduces the tax rate of employers who have a record of maintaining employment. See Labor Law, sec. 581.

Under their ratings at the time they were suspended, the National and State Parties, respectively, had been taxed under the state law at the rate of 0.7% and 0.8% of payroll rather than at the maximum rate of 2.7%.[2] So long as petitioners remained subject to state taxation, they received a credit under the Federal Unemployment Tax Act equal to 2.7% of their payrolls and therefore paid a federal tax at the rate of only 0.3% of payroll. See 26 U. S. C. 3301, 3302(b). Accordingly, their state and federal taxes aggregated 1% of payroll in the case of the National Party and 1.1% in the case of the State Party. The action of respondent in terminating petitioners' liability to state taxation deprived them of the credit provided by 26 U. S. C. 3302(b) and subjected them to federal taxation at the rate of 3% of payroll under 26 U. S. C. 3301.

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[2] The National Party introduced evidence of its rate of taxation (R. 85, 151) and the respondent does not dispute that the State Party was being taxed at a 0.8% rate at the time of its suspension.

Accordingly, as petitioners showed, the action of respondent resulted in tripling their liability for unemployment insurance taxes.[3]

The referee sustained the determinations of the respondent both in suspending petitioners as contributing employers and in denying Albertson unemployment insurance benefits based on his employment with the National Party. He did so on the ground that sections 2 and 3 of the Communist Control Act declaring that "the Communist Party should be outlawed"[4] and depriving the petitioners of rights, privileges and immunities, terminated their right to be employers or to have persons in their employment (R. 29-35, 38-42). The Unemployment Insurance Appeal Board affirmed (R. 11-13). The Appellate Division reversed unanimously, holding that the Communist Control Act did not terminate petitioners' status as contributing employers under the state law or affect the right of their employees to unemployment insurance benefits (*infra*, pp. 31-34).

The Court of Appeals, reversing the Appellate Division, reinstated the suspension of petitioners as contributing employers. However, it affirmed the decision of the Appellate Division that Albertson should be credited with his employment by the National Party in determining his unemployment insurance benefits (*infra*, p. 23).

The six judges who participated in the decision handed down three separate opinions, two judges joining in each.[5]

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[3] On November 21, 1958, while this case was pending in the Appellate Division, the Bureau of Internal Revenue notified each petitioner of an increase in its tax liability under the federal act as a result of the cessation of their contributions under the state act. The Bureau was advised of the pendency of litigation to reverse respondent's ruling, and petitioners have continued to make payment to the Bureau at the 0.3% rate.

[4] In arguing *Communist Party* v. *S.A.C.B.*, No. 12, this Term, the Solicitor General stated that this recital has no legal consequences or effect.

[5] Judge Foster, who was the presiding judge of the Appellate Division when the case was heard and decided there, did not participate.

One opinion construed section 3 of the Communist Control Act as depriving petitioners of the status of employers for "[w]hatever value that status may have" and held that, as so construed, the Act is constitutional. It further held, however, that since Albertson's employment with the National Party ended before the latter was suspended as a contributing employer, "it would be unreasonably punitive" to deny him his insurance. (*Infra*, pp. 19-23) [6] Another opinion concurred with the first as to the construction and constitutionality of the Communist Control Act but held that, as so construed, the Act deprived Albertson of the status of an employee and hence of unemployment insurance benefits (*infra*, pp. 29-30). The third opinion construed the Communist Control Act as not affecting the status of petitioners under the state law and accordingly held that they were subject to taxation as employers and that Albertson was entitled to benefits (*infra*, pp. 23-29).

Reasons for Allowing the Writ

This case presents to the Court for the first times questions concerning the construction and constitutionality of section 3 of the Communist Control Act of 1954.[7] So far as petitioner is aware, section 3 has received judicial consideration in only one other case. See *Salwen* v. *Reis*, 16 N. J. 216 (1954).

When President Eisenhower signed the Act, he stated that its full impact "will require further careful study" (N. Y. Times, Aug. 26, 1954). Such study has resulted in no action by any agency of the federal government to con-

[6] The opinion specifically reserved decision as to the status of claimants for benefits whose employment by one of the petitioners post-dated the suspension (*infra*, p. 23).

[7] Questions as to the constitutionality of section 5 of the Act are before the Court in *Communist Party* v. *S.A.C.B.*, *supra*, and *Travis* v. *United States*, No. 3, this Term.

strue or apply the Act's fiat deprivation of petitioners' rights, privileges and immunities.

Thus, as already noted and as Judge Fuld's opinion points out (*infra*, p. 25), the Bureau of Internal Revenue, "admittedly aware of the Industrial Commissioner's position," continues to tax petitioners as employers under the Unemployment Tax Act. Similarly, a referee for the Social Security Administration has held that the National Party is an employer within the meaning of the Social Security Act (42 U. S. C. 410) and that its retired employees are entitled to old age benefits based on wages earned subsequent to enactment of the Communist Control Act. *Matter of Foster, et al.* (R. 165 *et seq.*).

Again, no attempt has been made under section 3 to deny petitioners such federal rights or privileges as the use of the mails, radio and television. Nor has it ever been suggested that section 3 deprives petitioners of any procedural rights. Cf. *Communist Party* v. *S. A. C. B.*, 351 U. S. 115 and No. 12, this Term.

Thus, New York rushed in where the federal authorities have refrained from treading. In so doing, as the opinion of Judge Fuld points out (*infra*, p. 26), New York has made a breach in the "coordinated and integrated dual system" of federal and state unemployment insurance taxation which Congress intended to establish.

Review by this Court is required for the foregoing reasons and because, as we will show, the court below erred in construing the Communist Control Act and in deciding the important constitutional questions which the case presents.

1. The Court of Appeals erroneously construed and applied section 3 of the Communist Control Act.

A. The obligation to pay unemployment insurance taxes is not a right, privilege or immunity.

Section 3 of the Communist Control Act purports to terminate "whatever rights, privileges, and immunities which have heretofore been granted" to petitioners "by reason of the laws of the United tates or any political subdivision thereof." Assuming that New York is a "political subdivision" of the United States (see *infra*, p. 9), its Unemployment Insurance Law does not grant employees any right, privilege or immunity. On the contrary, the law imposes a liability upon them—the liability to pay an unemployment insurance tax. Accordingly, since the Communist Control Act does not purport to terminate petitioners' liabilities, it does not affect their status as taxpayers under the state statute. Two members of the Court of Appeals and an unanimous Appellate Division so held (*infra*, pp. 28, 33).

It is true that so long as petitioners remain liable to the state tax, they realize a substantial tax saving under the inter-related state and federal systems (see *supra*, p. 4). But, contrary to the majority below (*infra*, p. 21), the fact that this tax liability happens to be of value to petitioners cannot transmute the liability into a right.

B. Section 3 does not deprive petitioners of the right to be employers.

The prevailing opinion below (*infra*, p. 21) recognizes that "paying a tax is not really claiming an 'immunity' or 'right.'" The opinion seems to reason, however (*ibid.*), that petitioners' liability for the tax depends upon the existence of their status as employers, and that this status is a "right" which the Communist Control Act extinguished. Thus, the decision below turns upon construing

section 3 of the Act as terminating the right of petitioners to be employers. This construction of section 3 is erroneous.

The prevailing opinion states (*infra*, pp. 21-22):

> "The situation in our court is that these Communist Parties are demanding that they be restored to this State's list of employers. They come as unincorporated groups claiming rights or privileges, but all rights of unincorporated associations are created by and dependent upon the State."

Petitioners agree that their right to be employers—*i.e.*, the right to have and to act through employees—is a right granted by state law. For that reason, it is a right which section 3 does not disturb.

Section 3 purports to terminate all rights granted to petitioners "by reason of the laws of the United States or any political subdivision thereof." This provision does not affect rights which petitioners enjoy by virtue of state law. For the states are not "political subdivisions" of the United States. A subdivision is: "A part of a thing made by subdividing." Webster, *New International Dictionary*. The states, of course, were not "made by subdividing" the nation, but themselves "made" the United States.

Moreover, if Congress had intended section 3 to extinguish rights granted by the states, it would have said so by using the word "state". It did so in the first clause of section 3 which speaks of "the Government of the United States, or the government of any state, territory, district or possession thereof, or the government of any political subdivision therein." As this wording shows,[8] Congress understood the distinction between a political subdivision and a state, and did not use the former when it meant the latter.

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[8] And see the similar wording of 18 U. S. C. 2385.

The interpretation of section 3 by the majority below is not only contrary to its text but violates the principle that statutes must be narrowly construed so as to avoid questions of constitutionality. *United States* v. *Rumely*, 345 U. S. 41; *United States* v. *Witkowvich*, 353 U. S. 194; *United States* v. *Five Gambling Devices*, 346 U. S. 441.

As construed below, section 3 deprives petitioners of the right to employ persons for any purpose whatsoever. But under its granted powers and the Tenth Amendment, Congress may not legislate with respect to rights which are dependent solely on state law. For example, it may not restrict the right of an employer to fix the wages and hours of employees whose employment does not substantially affect interstate commerce. *United States* v. *Darby*, 312 U. S. 100, 117. Obviously, therefore, it may not extinguish the right to be an emplyoer of such employees.

C. The construction of section 3 by the court below is contrary to that adopted by Congress.

On August 1, 1956, Congress amended the Insurance Contributions Act and the Social Security Act by excluding from taxation and coverage services in the employ of an organization after it has been finally ordered to register as a Communist organization under the Internal Security Act. 26 U. S. C. 3121 (b) (17) and 42 U. S. C. 410 (a) (17) See *Communist Party* v. *S. A. C. B.*, *supra*. These amendments were evidently inspired by the referee's decision in *Matter of Foster* (R. 164, 166, 189) that the National Party is an employer within the meaning of the Social Security Act and that its retired employees are entitled to old age benefits based on their earnings from employment by it, including employment subsequent to enactment of the Communist Control Act.

If Congress had believed that the *Foster* decision was erroneous in failing to hold, like the majority below, that the Communist Control Act extinguished the right of peti-

tioners to be employers and therefore terminated their liability for employment taxes, it would have rectified the error by an appropriate amendment to the Insurance Contributions Act. Instead, it adopted an amendment, consistent with the *Foster* decision, which does not exclude petitioners from taxation unless and until they are finally ordered to register as Communist organizations.[9] Accordingly, Congress acquiesced in the *Foster* decision and gave it the force of law. *Copper Queen Mining Co.* v. *Arizona Board*, 206 U. S. 474; *Muss. Mutual Life Ins. Co.* v. *United States*, 288 U. S. 269; *Johnson* v. *Manhattan Ry. Co.*, 289 U. S. 479. It follows that the court below construed the Communist Control Act in a manner contrary to the construction given it by Congress.

2. Section 3 of the Communist Control Act is unconstitutional on its face and as construed and applied.

A. Section 3 violates the due process clause of the Fifth Amendment.

The Court of Appeals held that section 3 "necessarily means that the artificial body or entity calling itself the Communist Party is to be deprived of all the 'rights, privileges, and immunities' that other such entities have," including the right to be an employer. It stated that, "We see no denial of due process in the deprivation of [petitioners] of their status without a hearing," because the recitals of petitioners' alleged misdeeds in section 2 of the Act "are so well established and known that recognition of them without further proof is a right and duty." (*Infra*, pp. 21, 22.)

The holding below contravenes the decisions of this Court.

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[9] Since Congress did not amend the Unemployment Tax Act in a similar manner, it would appear that it intended to continue the liability of petitioners for unemployment taxes even in the event of a final registration order against them.

The right of petitioners to be employers, like the other rights of which section 3 deprives them, are a form of their liberty and property, protected by due process. *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379; *Miller* v. *Wilson*, 236 U. S. 373; *Prudential Insurance Co.* v. *Cheek*, 259 U. S. 530.

The Fifth Amendment prohibits Congress from depriving an organization of liberty or property without according it a hearing on the alleged facts which are relied upon to justify the deprivation. *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123; *Morgan* v. *United States*, 304 U. S. 1. If any of the facts required to support the deprivation are found legislatively rather than on the basis of evidence adduced at a hearing, due process has been violated. *Tot* v. *United States*, 319 U. S. 463; *Manley* v. *Georgia*, 279 U. S. 1; *McFarland* v. *American Sugar Refining Co.*, 241 U. S. 79.

On its face and as applied below, section 3 grossly violates this principle. It deprives petitioners of their liberty and property without any hearing whatsoever. Instead, all of the "facts" which are supposed to support the deprivation have been found by Congress in section 2. The denial of due process could not be more flagrant.

Section 3 also violates the principle of substantive due process that legislation must be "reasonably restricted to the evil with which it is said to deal." *Butler* v. *Michigan*, 352 U. S. 380, 383. The Communist Control Act purports in section 2 to deal with activities of the Communist Party which threaten the national security. But section 3 is not restricted to such activities. On its face and as applied below, the section deprives petitioners of all their rights, including the right to engage, as employers or otherwise, in lawful and peaceable activity which cannot possibly endanger the national security. The effect of the Act and the decision below, therefore, "is to burn the house to roast the pig" (*ibid.*).

B. Section 3 is a bill of attainder.

"A bill of attainder is a legislative act which inflicts punishment without a judicial trial." *Cummings* v. *Missouri*, 71 U. S. 277, 323.

The Communist Control Act is a bill of attainder in the classical form described in *Cummings, ibid.* It is directed against petitioners by name. Section 2 pronounces them guilty of conspiring to overthrow the government by force and violence and declares that they should be outlawed. Section 3 deprives them of their rights, privileges and immunities.

On its face and as applied, section 3 imposes punishment. The deprivation of rights which it decrees is based solely on alleged past activities of the Communist Party. The deprivation is both absolute and permanent. For the statute permits petitioners no escape from the sanctions of section 3. There is nothing that they can do to restore to themselves the rights which that section denies them. Furthermore, since section 3, as construed below, deprives petitioners of *all* of their rights as artificial entities, it is evident that the statute was not inspired by Congressional concern for any particular activity or status but was aimed at petitioners. These are the indicia of punishment. *Cummings* v. *Missouri, supra; United States* v. *Lovett*, 328 U. S. 303; *Trop* v. *Dulles*, 356 U. S. 86; *Flemming* v. *Nestor*, 363 U. S. 603. Since the punishment is imposed without a trial, judicial or otherwise, section 3 is a bill of attainder.

C. Section 3 is an *ex post facto* law.

"By an *ex post facto* law is meant one which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed; or changes the rules of evidence by which less or different testimony is sufficient to convict than was then required." *Cummings* v. *Missouri, supra*, at 325-26, quoting Chief Justice Marshall.

As we have shown, section 3 of the Communist Control Act imposes punishment on petitioners for their alleged participation, prior to enactment of the law, in a conspiracy to overthrow the government by force and violence. While such conspiracies were previously punishable by fine and imprisonment (18 U. S. C. 2384), section 3 imposes additional punishment in the form of a deprivation of rights. Moreover, unlike 18 U. S. C. 2384 which requires a judicial trial for conviction and punishment of the offense, section 3 imposes punishment by legislative fiat without evidence or trial. Accordingly, section 3 is an *ex post facto* law as defined above. See *Cummings* v. *Missouri, supra,* at 325-30.

D. Section 3 is not within the legislative power of Congress.

We have shown that, as construed by the Court of Appeals, section 3 deprives petitioner of rights granted by and dependent solely upon state law and that, so construed, the section is not within the competence of Congress and violates the Tenth Amendment. See *supra,* p. 10.

3. The action of respondent in suspending petitioners as contributing employers denied them due process of law and the equal protection of the laws in violation of the Fourteenth Amendment.

If the judgment below had been rested solely on a construction and application of the Communist Control Act, it would, of course, have presented no question under the Fourteenth Amendment. The prevailing opinion, however, seems at some points to have held that petitioners' status as contributing employers was terminated, not by section 3 of the Communist Control Act, but by the action of respondent in suspending their registrations. Thus, the opinion states (*infra,* p. 22):

> "The Appellate Division recognized in its opinion that the State might by appropriate steps prevent

> the Communist Parties 'from engaging in any activity or existence.' We think that the State of New York has already done so. The Attorney general, its highest law officer, argues to us on this appeal that the unemployment insurance officers acted validly in denying further recognition to the Communist Parties."

The prevailing opinion's reliance on state action also appears from the holding (*infra*, pp. 22-23) that although Albertson's employment by the National Party postdated the Communist Control Act, he was nevertheless entitled to unemployment benefits because his employment occurred prior to the suspension of the National Party as a contributing employer.

Furthermore, the amended remittitur (*infra*, p. 38) states that the court passed upon the question "whether the action of appellant as Industrial Commissioner in suspending the registrations of the employers-respondents as employers under the Unemployment Insurance Law denied them due process of law or the equal protection of the laws in violation of the Fourteenth Amendment," and held "that the action of the Industrial Commissioner in no way violated or deprived respondents of their constitutional rights." This holding is plainly erroneous and likewise requires review.

As we have seen (*supra*, p. 4), the effect of respondent's action in suspending the petitioners as contributing employers is to triple their liability for unemployment insurance taxes. Yet, this taking of petitioners' property was not authorized by the legislature, and neither respondent nor the Court of Appeals justifies the taking under any state statute. For this reason alone, the action of respondent violates the due process requirement of the Fourteenth Amendment. *Sweezy* v. *New Hampshire*, 354 U. S. 234, 254-55.

The sole justification advanced by respondent for his action (R. 57) was the opinion of the New York Attorney General (*infra*, p. 42) that "the Communist Party is a conspiracy against the Government of the United States" and therefore should not "be permitted to enjoy the advantages and benefits of this public insurance program." However, many New York employers have not only been suspected or accused but (unlike petitioners) have been convicted of criminal conspiracy and other violations of State or federal criminal laws, including the anti-trust laws, fraud and obscenity statutes, fair rent laws and the like. Yet, neither respondent nor the Attorney General has ever ruled that such convicted employers are excluded from coverage under the Unemployment Insurance Law, and they and their employees continue to enjoy its benefits. It was therefore both discriminatory and arbitrary to single out petitioners for exclusion from coverage. Accordingly, the action of the respondent violated both the due process and equal protection clauses of the Fourteenth Amendment. *Konigsberg* v. *State Bar*, 354 U. S. 252, 262.

Respondent's action denied petitioners due process for two further reasons. First, the action was taken without proof of or a hearing on petitioners' alleged character as criminal conspirators.[10] Second, even if the premise for respondent's action could be accepted without proof, it would not justify the termination of petitioners' status as employers with respect to employment which is lawful and peaceable. See *supra*, p. 12.

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[10] Even if it were assumed, contrary to the decision below (*infra*, p. 22) that petitioners could have introduced evidence to rebut the accusation of the Attorney General, the opportunity to do so would not have satisfied due process. *Speiser* v. *Randall*, 357 U. S. 513.

CONCLUSION

Certiorari should be granted and the judgment below reversed.

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Appendix A—Opinions Below

STATE OF NEW YORK

COURT OF APPEALS

In the Matter

of

The Claim of WILLIAM ALBERTSON,

Respondent.

ISADOR LUBIN, as Industrial Commissioner,

Appellant.

In the Matter

of

COMMUNIST PARTY, U. S. A., et al.,

Respondents.

ISADOR LUBIN, as Industrial Commissioner,

Appellant.

Decided May 26, 1960

Chief Judge Desmond. Two separate but related questions arise in this consolidated proceeding. We are first to decide whether, on the theory that his employment by the Communist Parties (N. Y. and U. S. A.) was not "covered employment", respondent Albertson is ineligible for unemployment insurance benefits. Second, we must determine whether the Industrial Commissioner was legally justified in suspending the registration of the Communist Parties themselves as "employers" within the meaning of the Unemployment Insurance Law.

We agree with the Appellate Division that Albertson is not to be denied an unemployment insurance award solely because part of his base period of employment was with Communist organizations. Nothing was proven beyond that bare fact. There is no statute or other precedent disqualifying him from coverage. His work with the Communist organizations was not shown to have been criminal, conspiratorial or traitorous. Despite the equivocal status and illegal purposes of his employer, his own contract of hiring (unlike that in *Matter of Clarke* v. *Town of Russia*, 283 N. Y. 272) was not so completely illegal as to prohibit unemployment insurance coverage. It would be unreasonably punitive to hold that, because the employer who paid unemployment taxes for him was engaged in an anti-American conspiracy, Albertson must lose his insurance. Since the striking of the Parties from the list was as of March 26, 1957, there is no inconsistency in protecting the insurance rights of Albertson whose employment ended before that date.

As to the alleged rights of Communist Parties to recognition and listing, however, we disagree with the Appellate Division. The Industrial Commissioner in performing his statutory duty (Labor Law, § 571) of computing and collecting these taxes had necessarily to decide who were "employers" under the act (*Matter of Electrolux Corp.*, 286 N. Y. 390, 397). In so doing, he could not ignore the Federal Communist Control Act (50 U. S. C. 842) which declared that the Communist Party "is not entitled to any of the rights, privileges and immunity attendant upon legal bodies created under the jurisdiction of the laws of the United States or any political subdivision thereof; and whatever right, privileges and immunities which have heretofore been granted to said party or any subsidiary organization by reason of the laws of the United States or any political subdivision thereof are terminated." We take that plain declaration and its absolute language to mean

what it says, although we find no decisions construing it in this connection. It necessarily means that the artificial body or entity calling itself the Communist Party is to be deprived of all the "rights, privileges, and immunities" that other such entities have. The Appellate Division dealt with this statutory language by saying that the requirement of paying an unemployment insurance tax is not an "immunity or right" where the employer has been allowed by the State to exist, has in fact been allowed the exercise of other privileges and where no reason is shown why it should not pay this tax. Of course, paying a tax is not really claiming an "immunity" or "right" but with the payment of this particular tax goes a status and enrollment as an employer. Whatever value that status may have is being sought and claimed by the Communist Parties in this proceeding.

The State officers of New York, reading literally the Federal statute, have deprived the Communist Parties of their former places on the State's official roll of employers. The Federal Government, although charged with the enforcement of its own Communist Control Act, is, we are told, still collecting unemployment insurance taxes from the Communist Parties. What the reason is for this position we do not know and there is not enough in the record to prove any binding Federal administrative construction of the Federal act. We know that the Communist Parties are allowed to use the mails, list themselves in the telephone books, hold public meetings and write letters to magazines (see Harper's for May, 1960, communication signed by the Party's "National Educational Secretary"). But we are not here determining whether the reports of the demise of these organizations are exaggerated. The situation in our court is that these Communist Parties are demanding that they be restored to this State's list of employers. They come as unincorporated groups claiming

rights or privileges but all rights of unincorporated associations are created by and dependent upon the State. The Appellate Division recognized in its opinion that the State might by appropriate steps prevent the Communist Parties "from engaging in any activity or existence." We think that the State of New York has already done so. The Attorney-General, its highest law officer, argues to us on this appeal that the unemployment insurance officers acted validly in denying further recognition to the Communist Parties.

We accept none of the arguments that this Federal Communist Control Act is unconstitutional. We do not think that it is a bill of attainder or *ex post facto* legislation. We see no denial of due process in the deprivation of these organizations of their status without a hearing. Section 841 of 50 United States Code contains a Congressional finding that the Communist Party is not really a political party but "in fact an instrumentality of a conspiracy to overthrow the government of the United States", that it is dedicated "to the proposition that the present constitution of the United States ultimately must be brought to ruin by any available means, including a resort to force and violence", and that as an agency of a hostile foreign power it is "a clear, present and continuing danger to the security of the United States." Similar pronouncements are found in a number of decisions of this court and of the United States Supreme Court (see *Dennis* v. *United States*, 341 U. S. 494, 547; *Matter of Lerner* v. *Casey*, 2 N. Y. 2d 355, 372, aff'd 357 U. S. 468). These are not mere fiats or rhetorical flourishes but recognitions by courts and Congress of facts that are so well established and known that recognition of them without further proof is a right and duty (See *East New York Sav. Bank* v. *Hahn*, 293 N. Y. 622, 627, aff'd 326 U. S. 230).

The administrative determination suspended the registration of the Communist Parties as of March 26, 1957 and the State has not accepted any reports or pay-

ment of contributions since that date. Since Albertson's employment was earlier than that date there is no difficulty as to him. If there are or will be unemployment insurance problems as to other employees of these Communist Parties, decision on those problems will have to wait until the claims, if any, are presented in the usual way. Many corporations and bodies are considered not to be employers under the Act (see Labor Law, § 560, subd. 4), and presumably their employees are aware of it.

The order of the Appellate Division should be modified by reversing so much thereof as sets aside the suspension of the registration of the employers-respondents and the decision of the Unemployment Insurance Appeal Board in this connection reinstated, otherwise the Appellate Division order should be affirmed, with costs to claimant-respondent against the Industrial Commissioner.

Fuld, J. (dissenting). This is a curious case, a taxpayer, the Communist Party, resists exemption from taxes, while the State, through its Industrial Commissioner, insists on thrusting such an exemption upon it, because of the asserted impact of the Federal Communist Control Act of 1954.

The unemployment insurance system, a joint federal-state undertaking, provides benefits for persons involuntarily unemployed to be financed by an excise tax on employers (see U. S. Code, tit. 26, § 3301 et seq.; N. Y. Labor Law, art. 18). Having lost his job with the Parkside Delicatessen, following earlier employment with the Communist Party, U. S. A., the respondent Albertson applied for such benefits under this State's Unemployment Insurance Law (Labor Law, art. 18).[1] Although the Party had paid to the State all unemployment insurance contri-

[1] His employment with the Communist Party has been treated as essential to qualify him for such benefits.

butions required to be paid and had for many years made, and is currently making, tax payments to the United States Bureau of Internal Revenue under the Federal Unemployment Tax Act, the Industrial Commissioner decided that it was not subject to the tax and that, on this account alone, Albertson was not entitled to unemployment benefits.

This amazing result is sought to be supported by contentions about the nature of the Communist Party and the Constitutional powers of the Federal and State Governments to deal with it. But, under settled and salutary principles of adjudication, courts avoid decision on such large matters—here, not free of difficulty (see Auerbach, The Communist Control Act of 1954, 23 U. of Chi. L. Rev. 173, 183 et seq.; see, also, Remarks of Representative E. Celler, during House debate, 100 Cong. Rec. 14643)—unless they are necessary for a disposition of the issues presented. Here, there is no such necessity; decision of the issues now before us depends solely on the answer to one simple question of statutory construction. Is the Communist Party an "employer" subject to unemployment insurance taxes? If it is, the Appellate Division was correct, and its order reversing the Industrial Commissioner's determination must be affirmed.

The New York Unemployment Insurance Law, having its origin in the Federal Social Security Act of 1935 (U. S. Code, tit. 42, § 301 et seq.), defines an "employer", in exceedingly broad terms, as "any persons, partnership, firm, association, public or private * * *" (Labor Law, § 512). Absent an overriding legislative proscription, it is admitted, the Communist Party is an employer within the meaning of our statute, and is liable to pay taxes under the provisions of section 560. But, says the Industrial Commissioner, since 1954, the Federal Government, by enactment of the Communist Control Act (U. S. Code, tit. 50, § 841 et seq.), has prevented the Communist Party from

being an employer with the consequence that it is not subject to unemployment insurance taxes and its employees are not entitled to any benefits under our Unemployment Insurance Law.

This contention is unreasonable. In the first place, it is significant that the federal authorities, admittedly aware of the Industrial Commissioner's position, have taken one diametrically opposed and continue to recognize the Communist Party as an employer subject to the Federal act. And, although determination of the persons who fall within the class of employers subject to the state tax may not be a matter of federal law, there can be no doubt of the desirability, indeed, of the "obvious necessity of harmonizing where possible our state [unemployment insurance] law with the federal acts." (*Pioneer Potato Co.* v. *Div. of Employment Security*, 17 N. J. 543, 549, per Brennan, J.) In the second place, the Communist Control Act, relied upon by the Commissioner, may not, in any event, be read to support the determination which he made in this case.

That the Unemployment Insurance Law of New York, as well as of the other states, and the Federal Unemployment Tax Act (U. S. Code, tit. 26, §§ 3301-3308) make up a "cordinated scheme" (*Buckstaff Co.* v. *McKinley*, 308 U. S. 358, 364) is obvious from the merest perusal of the statutes concerned (see, esp., U. S. Code, tit. 26, §§ 3302, 3306; U. S. Code, tit. 42, § 503; Labor Law, §§ 530, 532, 536, 560, subd. 1, par. [c][2]) and has been the subject of judicial observation not only in this court, but in numerous other courts. (See, e.g., *Matter of Lazarus* [*Corsi*], 294 N. Y. 613, 618; *Buckstaff Co.* v. *McKinley*, 308 U. S. 358, 363-364, *supra*; *Lines* v. *State of California*, 292 F. 2d 201, 203, cert. den. 355 U. S. 857; *Scripps Mem. Hosp.* v. *California Empl. Comm.*, 24 Cal. 2d 669, 677; *Arnold College* v. *Danaher*, 131 Conn. 503, 507; *Stromberg Hatchery* v. *Ia. Emp. Sec.*

[2] Paragraph (c) of subdivision 1 of section 560 does not appear in the recodification which took effect in January of 1960.

Comm., 239 Iowa 1047, 1051; *Pioneer Potato Co.* v. *Div. of Employment Security*, 17 N. J. 543, 547, *supra*.) Thus, we are told on the highest authority that "it would seem to be a fair presumption that the purpose of Congress was to have the state law as closely coterminous as possible with its own. To the extent that it was not, the hopes for a coordinated and integrated dual system would not materilize." (*Buckstaff Co. v. McKinley*, 308 U. S. 358, 364, *supra*.) Perhaps, the strongest indication that "the administration of the branch of federal security which deals with [unemployment compensation] and the administration of the state laws [dealing with the same subject] constitute a single system" (*Arnold College* v. *Danaher*, 131 Conn. 503, 507, *supra*), is provided by the fact that our Legislature itself prescribed, as one of the conditions of liability for contributions under our law, that an employer is "liable for tax under the provisions of the federal government tax act" (Labor Law, § 560, subd. 1, par. [c].[3]).

Notwithstanding these overwhelming indications that the state and federal unemployment compensation provisions should be administered, insofar as possible, as one act, the Industrial Commissioner has refused so to consider them. He admits that the federal authorities, despite the statutes on which he relies and despite their awareness of his position, continue to deal with the employer respondents herein as "liable for tax under the provisions of the federal unemployment tax", but he insists that his judgment should not be controlled by their determination. Although he is not under compulsion to do so, the necessity to achieve "a coordinated and integrated dual system" (*Buckstaff Co.* v. *McKinley*, 308 N. Y. 358, 364, *supra*) represents so strong

[3] As noted in footnote 2, this paragraph does not appear in the recent recodification of section 560 which became effective January 1, 1960. It seems to have been omitted for technical considerations and without any regard to underlying policy.

a state and federal legislative policy that the Industrial Commissioner should have concluded that, as long as an employer is treated by the federal authorities as subject to the federal unemployment tax, it is liable for contributions under our Unemployment Insurance Law, unless, of course, our own statute embodies an express provision to the contrary. (See *Matter of Lazarus* [*Corsi*], 294 N. Y. 613, 618, *supra;* see, also, cases cited *supra;* cf. *Matter of Marx v. Bragalini*, 6 N. Y. 2d 322, 333; *Matter of Weiden*, 236 N. Y. 107, 110.) As was said by the Connecticut Supreme Court, "Unless the provisions of the state [unemployment insurance] statute clearly differ from those of the federal act, it must be assumed that the legislature intended that they be interpreted alike, and this is particularly true with reference to those which determine the persons who are obligated to make contributions." (*Arnold College* v. *Danaher*, 131 Conn. 503, 507, *supra.*)

In short, a determination by the federal authorities that, despite the Federal Communist Control Act, the Communist Party is an employer subject to registration and tax under the Federal Unemployment Tax Act (U. S. Code, tit. 26, § 3301 et seq.) requires a like decision by the Industrial Commissioner. Even were this not so, however, I would, nevertheless, regard the Commissioner's ruling as unreasonable since it rests on a mistaken reading of the Communist Control Act. Insofar as relevant that statute (U. S. Code, tit. 50) recites in section 842:

> "The Communist Party of the United States * * * [is] not entitled to any of the rights, privileges, and immunities attendant upon legal bodies created under the jurisdiction of the laws of the United States or any political subdivision thereof; and whatever rights, privileges, and immunities which have heretofore been granted to said party * * * are hereby terminated".

Whatever else this legislation may mean, it may not be taken to affect the "liability [of] any employer * * * for contributions" under our Unemployment Insurance Law (Labor Law Art. 18, §560). This, it seems obvious, necessarily follows from the fact that, whereas the act cuts off "rights, privileges and immunities", the status of an employer under the Unemployment Insurance Law involves, and is expressly denominated, a "liability" (see, e.g., Labor Law, §§560, 561, 562, 570, 572, 579), the duty to pay an "excise tax." (*Matter of Cassaretakis*, 289 N. Y. 119, 127, affd. 319 U. S. 306; see, also, *Matter of Burke*, 267 App. Div. 127, 130.) Certainly, a deprivation of "immunities" may not be read to *confer* an immunity from taxation and, just as surely, a loss of "rights" and "privileges" can hardly be said to *grant* a freedom from the obligation to pay a tax. Taxation is an intensely practical business, and the courts do not deal in riddles in interpreting tax statutes.

There are surely better ways of dealing with the problems posed by communism and the Communist Party than by forced and unreal construction of statutes designed to serve entirely different purposes. The plain fact is that our Unemployment Insurance Law was enacted to benefit the "unemployed worker" (Labor Law, §501), not the employer, and it is the latter who is burdened with a tax in order to fulfill the purposes of the statute. The imposition of such a burden upon the Communist Party as employer cannot possibly be deemed the sort of "right" or "privilege" denied to the Party by the Communist Control Act. If Congress had been intent upon depriving the Communist Party of its ability to enter into contracts or hire employees, it could easily and unmistakably have so provided. And, if our Legislature desired to prevent employees of the Communist Party from receiving unemployment insurance benefits, it could, I assume, have done so,

but, in the absence of such legislation, the Industrial Commissioner may not bring about this result simply by coining a new legal concept, a privilege new to our law, "the privilege to pay taxes".

This disposes of the proceedings brought by the respondent employer; the Communist Party is subject to registration and taxation as an employer under the Unemployment Insurance Law. And, that being so, it follows that the Appellate Division was also correct in holding, in the proceeding instituted by the respondent Albertson, that he had met all qualifications under the law and was entitled to unemployment benefits.

I would affirm the order appealed from in all respects.

VAN VOORHIS, J. (Concurring in part):

If the Communist Party in the United States is "the agency of a foreign power" and "an instrumentality of a conspiracy to overthrow the government of the United States" as the Congress of the United States has determined (50 U. S. Code, §841), on account of which it has been "outlawed" and declared not to be "entitled to any of the rights, privileges and immunities attendant upon legal bodies created under the jurisdiction of the laws of the United States or any political subdivision thereof" (id. § 842), then it cannot be recognized as a legitimate employer or its servants as legitimate employees. It has no living legal tissue. It enjoys neither the identity nor the rights, privileges or immunities of a legal organization. Unless these findings by the Congress are idle words, it lacks the power to make contracts and cannot enter into the relationship of employer and employee. No agency of a foreign power or its subsidiary organizations can have a legal status as part of "an authoritarian dictatorship within a republic," as the Communist Control Act says, certainly where its reason for existence is that which is above stated. Taxation does not make it legal (*U. S.* v. *Yuginovich*, 256

U. S. 450, 462; *U. S.* v. *Stafoff*, 260 U. S. 477, 480; *U. S.* v. *One Ford Coupe*, 272 U. S. 321, 326).

These conclusions are in accord with the majority opinion in so far as it upholds the suspension of the registration of the Communist Party—State and national—but not in regard to the allowance of unemployment insurance to Albertson. In our view the order of the Appellate Division should be reversed in its entirety and the determination of the Unemployment Insurance Appeal Board reinstated.

Judge Dye concurs with Chief Judge Desmond; Judge Fuld dissents in part and votes to affirm the order appealed from in all respects in an opinion in which Judge Froessel concurs and except Judge Van Voorhis who concurs in part but votes to reverse the order appealed from and to reinstate the determination of the Unemployment Insurance Appeal Board in an opinion in which Judge Burke concurs; Judge Foster taking no part.

Order of the Appellate Division modified in accordance with the opinion herein and, as so modified, affirmed, with costs to claimant-respondent against the industrial Commissioner.

Appendix A—Opinions Below

SUPREME COURT

APPELLATE DIVISION—THIRD JUDICIAL DEPARTMENT

Decision handed down June 17 1959

1251

In the Matter

of

The Claim for Benefits under Article 18 of the Labor Law, made by WILLIAM ALBERTSON,

Claimant-Appellant,

ISADOR LUBIN, as Industrial Commissioner,

Respondent.

In the Matter

of

The Liability for Unemployment Insurance Contributions under Article 18 of the Labor Law of Communist Party, U. S. A. and Communist Party of New York State,

Employers-Appellants,

ISADOR LUBIN, as Industrial Commissioner,

Respondent.

APPEALS FROM DECISIONS OF THE UNEMPLOYMENT INSURANCE APPEAL BOARD.

Claimant-appellant Albertson was employed by the Communist Party, U.S.A., as an assistant labor secretary and testified that his duties were the study of wage trends in the

labor movement and preparation of analyses of proposed labor legislation. On July 16, 1956, being unemployed, he filed a claim for unemployment insurance benefits, stating that part of the base period to qualify him for benefits was in employment with the Communist Party; and part with other employers. The Industrial Commissioner denied claimant benefits and suspended the registrations of the national and state Communist parties as contributing employers. On Appeal, the Unemployment Insurance Appeal Board affirmed the determinations. The reason for the suspension of the parties is that they constituted a criminal conspiracy and had been outlawed by Congress in the Communist Control Act (68 Stat. 775; 50 U.S.C.A. 841), which enacted (section 3) that the Communist Party is "not entitled to any of the rights, privileges, and immunities attendant upon legal bodies * * * and whatever rights, privileges and immunities which have heretofore been granted * * * are terminated."

The proof is that for twenty years the State Department of Labor had accepted unemployment contributions from the parties (national and state) and the record shows that tax payments under the Federal Unemployment Tax Act are currently being paid by the two Communist parties to the U. S. Bureau of Internal Revenue. No criminal or conspiratorial act is shown in the record as to the claimant's actual work for the Communist Party. The basis of his disqualification is that all the employer's activities are outlawed.

The record demonstrates that the Federal government has not taken any steps to deprive the Communist Party of an ability to perform certai functions of existence, such as renting an office, hiring employees, using the post office or obtaining telephone service in pursuance of the Com-

munist Control Act of 1954. No doubt the State of New York could take such steps in this direction as it might deem warranted. But having permitted the Communist Party to hire and pay the claimant as an employee and to have and maintain offices and to permit claimant to work in its offices, and to file and pay unemployment insurance taxes, the benefits of such payments should be paid in accordance with law.

Besides this, the claimant himself is not shown on the record to be deprived by any law of the United States or of the State of New York of unemployment insurance benefits. No personal disability arising from any personal criminal activity in which he took part is shown in the record to arise from any statute, nor is it demonstrated he is outlawed or deprived of civil rights.

As far as the employer is concerned the requirement to pay an unemployment insurance tax is not an "immunity and right" within the Federal statute, where the employer has been allowed by the State to exist and has been allowed the exercise of other forms of existence, and we see no reason grounded in law why it should not pay the usual tax.

We do not hold that the State may not prevent the Communist Party from engaging in any activity of existence, such as hiring employees or renting quarters; nor do we hold that if a particular hiring is itself shown to be criminal in the actual employment, that the employee is then entitled to benefits for the period of such employment. But if the State permitted the employer to hire employees, with knowledge derived from the payment of taxes and reports made for many years that such employees were hired and working, there seems no legal ground for not

applying the tax and granting the benefits as provided by law. This is not based on a principle of estoppel, but is a statutory effect of allowing the employment and taking the tax based on it. If it were demonstrated that a specific employment were criminal as distinguished from a status attaching to the employer itself, a different result might become permissible as to the claim for benefits arising from such an employment, but that is not the showing of the reason.

Decision reversed without costs and claim remitted to the Unemployment Insurance Appeal Board for further proceedings.

Foster, P. J., Bergan, Gibson, Herlihy and Reynolds, JJ., concur.

Appendix B—Judgment Below and Amendment Thereto

COURT OF APPEALS

Remittitur May 26, 1960

—o—

No. 409

In the Matter of the Claim for Benefits under Article 18 of the Labor Law made by WILLIAM ALBERTSON,

Respondent,

v.

ISADOR LUBIN, as Industrial Commissioner,

Appellant.

(And another proceeding COMMUNIST PARTY, U. S. A. and COMMUNIST PARTY OF NEW YORK STATE.)

—o—

BE IT REMEMBERED, That on the 15th day of December in the year of our Lord one thousand nine hundred and fifty-nine, Isador Lubin, as Industrial Commissioner, the appellant—in these causes, came here unto the Court of Appeals, by Louis J. Lefkowitz, Attorney General, and filed in the said Court Notices of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the Third Judicial Department. And William Albertson, and Communist Party, U. S. A. and Communist Party of New York State, the respondents in said causes, afterwards appeared in said Court of Appeals by Vladeck & Elias, and John J. Abt, their respective attorneys.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, the said Court of Appeals having heard this cause argued by Julius L. Sackman, of counsel for the appellant, and by Mr. Stephen C. Vladeck, of counsel for the claimant-respondent, and by Mr. John J. Abt, of counsel for the employers-respondents, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be, and the same hereby is modified in accordance with the opinion herein and, as so modified, affirmed, with costs to claimant-respondent against the Industrial Commissioner.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the Appellate Division of the Supreme Court, Third Judicial Department, there to be proceeded upon according to law.

Wherefore, it is considered that the said order be modified, etc., as aforesaid.

Thereupon, as well the Notices of Appeal and return filed aforesaid as the judgment of the Court of Appeals, and by it given in the premises, are by the said Court of Appeals remitted into the Appellate Division of the Supreme Court, Third Judicial Department, and the Justices thereof, according to the form of statute in such case made and provided, to be dealt with according to law, and which record now returned be to the said Appellate Division, and the Justices thereof, etc.

/s/ RAYMOND J. CANNON,
Clerk of the Court of Appeals
of the State of New York.

Appendix B—Judgment Below and Amendment Thereto

STATE OF NEW YORK

IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the eighth day of July A. D. 1960.

Present:

HON. CHARLES S. DESMOND, *Chief Judge*, presiding.

—o—

Mo. No. 406

In the Matter of the Claim for Benefits under Article 18 of the Labor Law made by WILLIAM ALBERTSON,

Respondent,

ISADOR LUBIN, as Industrial Commissioner,

Appellant.

(And another proceeding—COMMUNIST PARTY, U. S. A. and COMMUNIST PARTY OF NEW YORK STATE, Employers-Respondents.)

—o—

A motion to amend the remittitur in the above cause having been heretofore made upon the part of the employers-respondents Communist Party, U. S. A., and Communist Party of New York State herein and papers having been submitted thereon and due deliberation thereupon had:

ORDERED, that the said motion be and the same hereby is granted. Return of the remittitur requested and, when

returned, it will be amended by adding thereto the following:

> Upon the appeal herein there were presented and necessarily passed upon questions under the Constitution of the United States, viz.: Whether section 3 of the Communist Control Act of 1954 may be construed as terminating the right of the employers-respondents, Communist Party, U. S. A. and Communist Party of New York State, to be "employers" within the meaning of the New York Unemployment Insurance Law; whether, if so construed, section 3 of the Communist Control Act of 1954 is a bill of attainder or ex post facto law forbidden by Article 1, Section 9, Clause 3 of the United States Constitution, or violates the First Amendment or the due process clause of the Fourteenth Amendment * to the United States Constitution, or is beyond the constitutional power of Congress to enact, and whether the action of appellant as Industrial Commissioner in suspending the registrations of the employers-respondents as employers under the Unemployment Insurance Law denied them due process of law or the equal protection of the laws in violation of the Fourteenth Amendment to the United States Constitution. The Court of Appeals held that section 3 of the Communist Control Act of 1954 as construed by it was constitutional, and that the action of the Industrial Commissioner in no way violated or deprived respondents of their constitutional rights.

AND the Appellate Division of the Supreme Court, Third Judicial Department, is hereby requested to direct its Clerk to return said remittitur to this Court for amendment accordingly.

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* Thus in the original.

Appendix C—Statutes Involved

The Communist Act of 1954, 68 Stat. 775, 50 U. S. C. 841-44, provides in part as follows:

Findings of Fact

Sec. 2. The Congress hereby finds and declares that the Communist Party of the United States, although purportedly a political party, is in fact an instrumentality of a conspiracy to overthrow the Government of the United States. It constitutes an authoritarian dictatorship within a republic, demanding for itself the rights and privileges accorded to political parties, but denying to all others the liberties guaranteed by the Constitution. Unlike political parties, which evolve their policies and programs through public means, by the reconciliation of a wide variety of individual views, and submit those policies and programs to the electorate at large for approval or disapproval, the policies and programs of the Communist Party are secretly prescribed for it by the foreign leaders of the world Communist movement. Its members have no part in determining its goals, and are not permitted to voice dissent to party objectives. Unlike members of political parties, members of the Communist Party are recruited for indoctrination with respect to its objectives and methods, and are organized, instructed, and disciplined to carry into action slavishly the assignments given them by their hierarchical chieftains. Unlike political parties, the Communist Party acknowledges no constitutional or statutory limitations upon its conduct or upon that of its members. The Communist Party is relatively small numerically, and gives scant indication of capacity ever to attain its ends by lawful political means. The peril inherent in its operation arises not from its members, but from its failure to acknowledge any limitation as to the nature of its activities,

and its dedication to the proposition that the present constitutional Government of the United States ultimately must be brought to ruin by any available means, including resort to force and violence. Holding that doctrine, its role as the agency of a hostile foreign power renders its existence a clear, present and continuing danger to the security of the United States. It is the means whereby individuals are seduced into the service of the world Communist movement, trained to do its bidding, and directed and controlled in the conspiratorial performance of their revolutionary services. Therefore, the Communist Party should be outlawed.

PROSCRIBED ORGANIZATIONS

SEC. 3. The Communist Party of the United States, or any successors of such party regardless of the assumed name, whose object or purpose is to overthrow the Government of the United States, or the government of any State, Territory, District, or possession thereof, or the government of any political subdivision therein by force and violence, are not entitled to any of the rights, privileges, and immunities attendant upon legal bodies created under the jurisdiction of the laws of the United States or any political subdivision thereof; and whatever rights, privileges, and immunities which have heretofore been granted to said party or any subsidiary organization by reason of the laws of the United States or any political subdivision thereof, are hereby terminated: *Provided, however,* That nothing in this section shall be construed as amending the Internal Security Act of 1950, as amended.

The New York Unemployment Insurance Law, Labor Law, secs. 500 et seq., Consolidated Laws, Chap. 31, Art. 18, provides in part as follows:

SEC. 512. Employer.—"Employer" includes the State of New York and any person, partnership, firm, association, public or private, domestic or foreign corporation, the legal representative of a deceased person, or the receiver, trustee or successor of a person, partnership, firm, association, public or private, domestic or foreign corporation.

* * *

SEC. 570. Payment of contributions.—1. Rate. Each employer liable under this article shall pay contributions on all wages paid by him * * * Contributions shall be paid in an amount equal to two and seven-tenths per centum of such wages, except as otherwise provided by the provisions of sections five hundred seventy-seven and five hundred eighty-one of this article.

Appendix D—Opinion of the New York Attorney General

January 29, 1957

Hon. Isador Lubin
Industrial Commissioner
The Governor Alfred E. Smith
State Office Building
Albany 1, New York

Dear Commissioner Lubin:

Under date of August 22, 1956 you asked the opinion of former Attorney General Javits as to whether employment with the Communist Party of New York State or the Communist Party of the United States may form a basis for determining eligibility to unemployment insurance benefits under the New York State Unemployment Insurance Law; and whether compensation in such employment is subject to the payment of unemployment contributions under that law.

My answer to both questions is in the negative.

The Unemployment Insurance program operates under the auspices of, and is supervised and administered by, the Government of the United States and of this State. It appears to me implicit that the character and activities of the Communist Party foreclose it and its employees from the rights and privileges of participation in that program.

The nature of the Communist Party, its activities and objectives, have been characterized by the Congress of the United States in the Internal Security Act of 1950 and the Communist Control Act of 1954. To quote from the findings and declarations of fact in Section 2 of the latter Act (50 U. S. C. A., § 841):

> "The Congress finds and declares that the Communist Party of the United States, although pur-

> portedly a political body, is in fact an instrumentality of a conspiracy to overthrow the Government of the United States."

The section concludes:

> "* * * the Communist Party should be outlawed."

Section 3 of the same Act (50 U. S. C. A., § 842) provides that the Communist Party, its successors, and subsidiary organizations

> "are not entitled to any of the rights, privileges and immunities attendant upon legal bodies created under the jurisdiction of the laws of the United States or any political subdivision thereof; and whatever rights, privileges, and immunities which have heretofore been granted to said party or any subsidiary organization by reason of the laws of the United States or any political subdivision thereof, are terminated."

I draw your attention also to the "Congressional Findings of Necessity" in the Internal Security Act of 1950 (Section 2; 50 U. S. C. A., § 781).

In this State, the Legislature has, in the Feinberg Law (L. 1941, ch. 360, § 1) and in the Security Risk Law (L. 1951, ch. 233, § 1; Unconsolidated Laws, p. 1101), made findings of similar import in respect to the Communist Party.

The Court of Appeals of this State has written of the nature of the Communist Party (*Matter of Daniman* v. *Bd. of Education of the City of New York*, 306 N. Y. 532, 540):

> "In this court we are all agreed that the Communist Party is a continuing conspiracy against our Government. (See *Communications Assn.* v. *Douds*, 339 U. S. 382, 425 et seq.; *Dennis* v. *United States*, 341 U. S. 494, 564; Preamble to the Feinberg Law (L. 1949, ch. 360, § 1.)"

The Supreme Court of the United States has voiced like opinions (*Dennis* v. *United States*, 341 U. S. 499; *American Communications Assn.* v. *Douds*, 339 U. S. 382) and held members of the Communist Party subject to being proscribed from rights and privileges such as that of being a teacher in the public schools of this State (*Adler* v. *Bd. of Education*, 342 U. S. 485).

The Subversive Activities Control Act, to which I have already referred, was upheld as constitutional by the United States Court of Appeals for the District of Columbia Circuit, which held that the Communist Party of the United States was required to register thereunder as a Communist-action organization (*Communist Party of U. S.* v. *Subversive Securities Control Board*, 223 F. (2d) 531). The Court said at one point:

> "* * * we perceive no reason why the presently existing government in this country should not * * * withdraw from its (Communist organization's) members protection and privileges otherwise afforded by that government."

As to the nature of the Communist Party in this country, see some of the observations of Circuit Judge Prettyman in the course of this opinion, for example, pages 565 to 576. The Supreme Court of the United States, on appeal thereto, remanded the case to the Board without reaching the question of constitutionality, because the testimony of three witnesses before the Board was contended to be possibly perjurious (351 U. S. 115).

The Communist Party has thus been declared by the highest Court of this State, by the Supreme Court of the United States, by the Congress of the United States, and by the Legislature of this State, to be a conspiracy against the government of the United States and of this State, and as an organization, and as to members thereof, not entitled

to protections and privileges otherwise offered by government.

Returning then to the question here before us, I find that your department in the past, in administering the Unemployment Insurance Law, and the Courts, in another area of social insurance, Workmen's Compensation, have denied these rights in the case of employees of employers engaged in enterprises which are illegal, or declared by the Legislature to be against public policy. You have enclosed in your letter two determinations (one in 1951 and one in 1952) by your department to such effect. One of these decisions quotes from an earlier one as follows:

> "The Unemployment Insurance Law does not confer benefits upon an employee in a business which has been declared by the legislature to be against public policy and the conduct of which involves a violation of the criminal law."

In a case arising out of a Workmen's Compensation claim for injury resulting in death to a bartender employed in a saloon when prohibition was in effect, the Appellate Division (3rd Dept.) dismissing the claim, declared:

> "This Court will not lend its aid to the enforcement of any claim growing out of a contract of employment one of the purposes of which is the violation of a law of the land * * *".

For a like result, see also *Swihura* v. *Horowitz,* 215 App. Div. 740, aff'd 242 N. Y. 523.

It is my opinion that in light of the repeatedly declared views by the Courts and by the federal and this State's legislative bodies, that the Communist Party is a conspiracy against the Government of the United States and of this State, it would be an anomaly in law, not to say

amoral and against public policy, for the Communist Party and its employees to be permitted to enjoy the advantages and benefits of this public insurance program. To make such exclusion is, as I have set forth *supra*, matter of precedent. In so far as *scienter* on the part of the employee is concerned, it is certainly a fair inference that anyone now claiming benefits based on employment by the Communist Party during the past year (the base year for one now making unemployment insurance claims) had full knowledge of the nature, activities and objectives of the Communist Party.

I conclude, accordingly, that unemployment insurance contributions should not be received, pursuant to the New York State Unemployment Insurance Law, from the Communist Party of New York State or the Communist Party of the United States, and that employment by the Communist Party of New York State or the Communist Party of the United States should not be credited as a basis for determining unemployment insurance benefits under the statute by ruling of your department. The ultimate decision, of course, is in the courts, to which one considering himself aggrieved by your determination would have recourse.

Very truly yours,

LOUIS J. LEFKOWITZ,
Attorney General.